

William Patrick Gray
On behalf of the organization and net-zine:
Freedom In Good Hands Today
(F.I.G.H.T.)
<http://on.to/fight>

Copyright Office
of the Library of Congress,
In response to request for comment concerning
non-infringing uses as defined in the Digital Millennium Copyright Act

It is clear that the Digital Millennium Copyright Act must exist for the United States to fulfill its obligations under the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. The DMCA does fulfill that obligation but it goes beyond what is truly necessary to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors use in connection with the exercise of their rights and that restrict acts which they have not authorized and are not permitted by law."

Under the DMCA it is unlawful to circumvent technologies protecting the copyright of authors in a digital environment. But under terms of fair use, this ruling cannot be absolute. We at FIGHT are concerned that this provision of the DMCA (17 U.S.C. 1201(a)) could be interpreted such that rights of fair use are restricted, and lend themselves to censorship of information that does not infringe upon an author's copyright.

It is legal for one to copy a VHS tape for one's own use, even when the copyrighted material on the tape is not that person's legal property. The individual has paid for the product and is entitled to do with it what he pleases aside from illegally copying the work for sale or distribution. DVDs (Digital Video Discs) are "protected" from illegal copying and distribution by an encryption system known as CSS (Content Scrambling System). The Motion Picture Association of America is the flag-bearer of this standard, the system having been implemented on all DVDs and DVD players and personal computer drives (for Microsoft Windows and Macintosh operating systems only!). CSS contains "region codes" which prevent a DVD bought in one global market region from being used on a DVD player bought in another. CSS also prevents one from viewing a DVD on a computer that does not have a Mac or Microsoft Windows Operating System, and from using a computer to copy a DVD to VHS tape for fair use (perhaps the DVD player is in the living room and you only have a VCR in the bedroom). **However, CSS DOES NOT PREVENT ONE FROM COPYING A DVD to ANOTHER DVD!** The new copy can be played on a DVD player bought within the same region code because *you do not need to de-scramble the content on a DVD in order to copy it.*

Because of these impediments to fair use, and perhaps for other reasons as well, software was developed that circumvented the CSS technology, and it was called DeCSS. Other programs have existed before this one to copy DVDs to computer hard drives (specifically one called DVD-rip). This software tool (DeCSS) serves the purpose of decrypting the contents, which allows the user (the person who legally bought the DVD

containing copyrighted material) to place the raw files in another digital medium, such as on their computer's hard drive. From here the user can make back-up copies of their own disks (a fair use), make a copy onto VHS tape format (a fair use), or attempt to configure a program of their own which will allow them to view the content files in another computer operating system (again a fair use), such as the growingly popular Linux Operating System.

The Motion Picture Association of America has filed suit against three individuals for posting the source code and/or executable files for DeCSS on their websites because they are somehow in violation of the DMCA. While it is true that DeCSS does allow a user to illegally copy and distribute copyrighted material, it also is by that very same nature a necessary tool for full use of a consumer's rights to fair use. In this United States Southern N.Y. District Court case, Judge Lewis A. Kaplan has already granted the plaintiffs "injunctive relief," forcing the defendants to remove the "offending" material from their websites until the actual trial can begin. The message here is clear as day: You cannot figure out how something you own works and tell other people! It does not matter that DeCSS provides the ability to illegally circumvent a copyright protection, simply because a VCR does as well. There are already statutes against illegal dissemination of copyrighted works in place, we the American People do not need statutes to tell us what we can and cannot know.

It is then imperative that the Copyright Office consider and recommend DVD CSS circumvention technology as a fair use simply because it actually does allow fair use. Any piece of software or equipment that served the same noble of purpose of DeCSS could not do so without also serving ignoble purposes. And we have laws for unscrupulous citizens. It is a fact that not being allowed (by the Federal Government, never mind the movie industry) to make a copy of your own purchase for your own fair use is a bent and backwards idea which could only serve to limit and inhibit our freedoms as citizens. It is also a limit and inhibition to the guaranteed freedom of free speech to outlaw telling other people how they can fairly use their own purchases. The case of DeCSS will ultimately make this decision and what the Library of Congress decides to define as fair use will be essential to how that case is decided.

Perhaps the Library of Congress and the Copyright office were expecting tangible and physical tools of "fair use," and not abstractions and theory. However, that is the nature of the "digital environment," how it was created and how it continues to operate. This should be the ultimate focus of the Librarian in consideration of this issue, because the LOC will have a hand in deciding who in the future of the United States has access control over what an individual has purchased – the individual, the federal government, or the providing industry. To side with the industry itself would be no less American than inviting a fascist to be make himself temporary dictator until some phantom threat has been abated.

Thank you for your time, and for extending the comment submissions deadline.

Sincerely,

William Patrick Gray